

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CRISHEONA R.

Claimant,

OAH No. 2010120143

vs.

INLAND REGIONAL CENTER,

Service Agency.

DECISION

Robert Walker, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter on September 22, 2011, January 25, 2012, and February 2, 2012, in San Bernardino, California.

Jennifer Cummings, Program Manager for Fair Hearings and Legal Affairs, Inland Regional Center, represented the service agency.

Valerie R., claimant's adoptive mother, represented the claimant, Crisheona R.

The record was held open to provide the parties with an opportunity to submit written arguments. The regional center's argument was received and marked for identification as exhibit R 24. Claimant's argument was received and marked for identification as exhibit C 9. The record was closed on March 16, 2012.

SUMMARY

Because of a determination that claimant has a condition that is closely related to mental retardation, she has been eligible for regional center services. The regional center contends that that determination was made in error and that claimant is ineligible for regional center services.

Does claimant have a substantially disabling condition that is closely related to mental retardation?

In this decision, it is determined that the regional center failed to prove by a preponderance of the evidence that claimant does not have a substantially disabling condition that is closely related to mental retardation.

FACTUAL FINDINGS

Background

1. Claimant is a 20-year-old, African-American female. Claimant's first cousin twice removed, Valerie R., adopted claimant. (When the term mother is used herein, it is in reference to the adoptive mother, Valerie R.) In 2005, claimant's mother, having concluded that claimant might be mentally retarded, applied for services from the regional center. A regional center interdisciplinary diagnostic team concluded that claimant was not eligible for services, and claimant appealed.

2. After a state level fair hearing, Administrative Law Judge Gary Brozio granted claimant's appeal. In a decision dated July 12, 2007, Judge Brozio determined that claimant had a condition that was closely related to mental retardation and, therefore, was eligible for regional center services.

3. In 2010, the regional center reassessed claimant and, again, a regional center interdisciplinary diagnostic team concluded that claimant was not eligible for regional center services. The regional center served claimant with a notice of proposed action in which the regional center advised claimant that her eligibility would be terminated. In that notice of proposed action, the regional center contended that the 2010 reassessment showed that Judge Brozio's 2007 decision was clearly erroneous.¹

4. Claimant appealed from the notice of proposed action, and that appeal is the subject of the present proceeding.

5. A developmental disability is a disability that originates before age 18, continues or is expected to continue indefinitely, and constitutes a substantial disability for the individual. Developmental disabilities include mental retardation, cerebral palsy, epilepsy, autism, and what is commonly referred to as the "fifth category" – a disabling condition that is closely related to mental retardation or that requires treatment similar to that required for mentally retarded individuals. (Welf. &

¹ The "clearly erroneous" language was not a gratuitous criticism of Judge Brozio. That language comes from the Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code, section 4400 et seq. Section 4643.5, subdivision (b), provides that an individual who is determined by a regional center to have a developmental disability shall remain eligible unless a regional center concludes that the original determination was "clearly erroneous."

Inst. Code, § 4512, subd. (a).) Given the disjunctive, the fifth category encompasses two grounds for eligibility.

Claimant's Social History

6. Before claimant came to live with Valerie R., she endured deprivation and abuse. Claimant's biological mother was mentally ill and had 13 children. Claimant has a twin sister. The biological mother was 12 years old when she gave birth to the twins. The twins were exposed to alcohol – and perhaps drugs – in utero. Claimant's biological mother reared her children in filthy conditions, burned them, and choked them with cords.

7. The children's maternal great grandmother adopted all 13 of the children, but she, too, abused and neglected them. There are reports that hot sauce was poured on claimant's vagina as a form of punishment and that guns were placed at the children's heads to intimidate them. Because of the abuse, authorities placed the children in group homes.

8. The great grandmother is Valerie R's aunt. In September of 2004, claimant and several of claimant's siblings came to live with Valerie R.

9. On November 13, 2008, because of allegations of abuse in Valerie R's home, claimant was again placed in a group home. She went through a few group-home and school placements. During this time, she was raped. Ultimately, claimant was returned to Valerie R's home.

Claimant's Mental Health Conditions and Her Seizure Conditions

10. Claimant has serious mental health problems. Behavioral problems include resistance, defiance, anger, and aggression. She engages in maladaptive behaviors. She engages in self-abusive behaviors. She has a history of auditory hallucinations. She takes medications for her mental health conditions. Claimant's mother testified that claimant has been diagnosed with childhood schizophrenia and with bipolar disorder.

11. Claimant has seizures. The following is a paraphrased summary of part of claimant's mother's testimony: Crisheona experiences complex partial seizures. She can have up to 50 seizures a day. And it causes her not to understand what is going on. I will be talking to her, and she will just start staring at me as though I am foreign. She also experiences petit mal seizures from time to time but less frequently than formerly.

Claimant's Psychological Assessments and Evaluations Related to Intellectual Functioning

12. On May 4, 2004, Barry R. Kendall, Psy.D., conducted a psychological assessment. This was before claimant went to live with Valerie R.; claimant had been taken from her great grandmother and was living in a group home. She was 12 years and 7 months old.

13. Dr. Kendall administered a number of tests, including the Wechsler Adult Intelligence Scale – Third Edition (WISC-III). On that test, claimant achieved a verbal abilities score of 60, which is in the extremely low range. She achieved a performance abilities score of 64, which also is in the extremely low range. These scores produced a full scale IQ of 59, which is in the extremely low range. Dr. Kendall concluded that “scatter,” i.e., significant differences in subtest scores suggested that claimant had a higher cognitive potential than her full scale IQ indicated. For example, claimant scored 9 on the digit symbol-coding subtest, 5 on picture completion, 1 on block design, and 1 on picture arrangement.

14. Dr. Kendall did not diagnose mental retardation. He concluded:

Socially and emotionally [claimant] has profoundly limited coping skills and significant deficits in her ability to integrate or create accurate or even adequate perceptions of her external and internal worlds. [¶] . . . [¶] Data further suggests themes of depression, loss, denial, and interpersonal conflicts – especially with males. [¶] . . . [¶] She presents with the effects of past unresolved multiple traumas and has created an inner fantasy world in order to survive. Her connection to reality is impaired by this fantasy world. She carries a high level of social anxiety that interferes with her academic functioning. She sees the world as damaged and ruined for her.

15. On Axis I, Dr. Kendall diagnosed Dysthymic Disorder, Early Onset, angry and irritable features; Psychotic Disorder Not Otherwise Specified; Social Phobia, school environment; and Psychological and Emotional Abuse of a Child.

16. On Axis II, which is the axis on which a mental retardation diagnosis would be found, Dr. Kendall made no diagnosis.

17. Dr. Kendall recommended treatment for claimant’s mental health diagnoses. He recommended psychotherapy, psychotropic medications, and group therapy.

18. Bob Chang, Ph.D., a staff psychologist with Inland regional Center, did not assess claimant. He, however, reviewed the assessments that had been performed and wrote a summary of his review. His summary is dated March 15, 2006. Dr.

Chang reported on two administrations of the Woodcock-Johnson – III Test of Achievement. Achievement tests do not measure intelligence or cognitive ability. They can, however, provide a check on intelligence tests. If, for example, someone scores very low on an IQ test but scores very high on achievement tests, that combination suggests that the IQ score is not reliable.

19. Dr. Chang reviewed a March 22, 2004, administration of the WJTA III. At that time, claimant should have been in the seventh grade. Dr. Chang does not report claimant's scores, but he says most of her scores were similar to the scores she received a year later in 2005. Dr. Chang also reviewed a January 21, 2005, administration of the WJTA III. At that time, claimant should have been in the eighth grade. Dr. Chang reported as follows: Claimant's academic skills were within the average range. Her academic knowledge and ability to apply academic skills were within the low range. Her performance in reading, math calculation, and basic writing skills was low average. Her performance in mathematics was low. Fourteen of claimant's scores were in the low average range, and 5 of her scores were in the mid to upper borderline range.

20. On December 7, 2005, Rob Zimmermann, Psy.D., a staff psychologist with Inland Regional Center, attempted to do an eligibility assessment, but he was unable to complete it. Dr. Zimmermann reported that, initially, claimant was pleasant and cooperative and showed multiple non-deficient abilities. She read aloud several sentences of text printed upside-down and backward, and she tried to associate words from a reading list into a story. Claimant, however, became less attentive. After a few breaks, the session was terminated.

21. On January 25, 2006, Edward B. Pflaumer, Ph.D., conducted a psychological assessment. Claimant was 14 years and 4 months old and should have been in the ninth grade. Dr. Pflaumer administered a number of tests, including the WISC-III. On that test, claimant achieved a verbal score of 54, which is in the extremely low range. She achieved a performance abilities score of 53, which also is in the extremely low range. These scores produced full scale IQ of 49, which is in the extremely low range. As was the case when Dr. Kendall administered the WISC-III, there was "scatter," i.e., significant differences in subtest scores that suggested that claimant had a higher cognitive potential than her full scale IQ indicated. For example, in the performance subtests, claimant received a scaled score of four on object assembly, two on picture arrangement, three on digit symbol-coding, and one on each of two additional subtests.

22. Dr. Pflaumer administered the Wide Range Achievement Test – 3. In reading, claimant achieved a standard score of 81, which is equivalent to a fourth grade level. In spelling, claimant achieved a standard score of 80, which is equivalent to a fourth grade level. In arithmetic, claimant achieved a standard score of 72, which is equivalent to a third grade level.

23. Dr. Pflaumer did not diagnose mental retardation. On Axis I, he diagnosed Depressive Disorder Not Otherwise Specified. On Axis II, which is the axis on which a mental retardation diagnosis would be found, Dr. Pflaumer wrote “diagnosis deferred.” Dr. Pflaumer wrote that additional investigation would be necessary. He said:

The key to this case is diagnosing whether Cris’ low scores are due to global cognitive and adaptive deficits or due to emotional and behavioral disturbances. There is clearly ample evidence that the emotional problems still exist as reported by [claimant’s mother] and confirmed through current observations and recent psychological evaluations. It can therefore be concluded that Cris’ emotional disturbance may have impacted her performance in this and previous testing.

Cris’ recent test scores vary dramatically and do not fit into a coherent picture. For example, it would not be expected for someone in the moderate or mild range of mental retardation to score in the average or low average range of academic achievement or show the level of social sophistication evidenced during the interviews at IRC. Additional investigation will be necessary in order to make an informed decision about whether she requires the services associated with mental retardation or whether she simply needs the services associated with emotional disturbance.

24. Dr. Pflaumer did not elaborate on his reference to claimant’s having scored “in the average or low average range of academic achievement” It is difficult to imagine that fourth grade reading, fourth grade spelling, and third grade arithmetic are average to low average achievements for a child who is supposed to be in the ninth grade.

25. As noted above, Dr. Chang reviewed records of assessments that others had conducted and wrote a summary of his review. Dr. Chang noted decreases in subtest scores from Dr. Kendall’s testing to Dr. Pflaumer’s testing and concluded that the changes suggested varying degrees of motivation. Dr. Chang said the records indicate that, in tests, claimant sometimes performs complex tasks but later in the same session refuses to perform similarly complex tasks. Dr. Chang said that avoidant behaviors and other behavioral challenges interfered with the testing.

26. From Dr. Chang’s review of the records, he concluded that “[i]t is likely that [claimant’s] behavioral challenges and reported adaptive deficits are the result of the impact of her history of severe abuse upon her personality development.”

Dr. Chang concluded that the records he reviewed did not support a diagnosis of mental retardation. He concluded, also, that those records did not support a finding that claimant had a disabling condition similar to mental retardation or one that required treatment similar to the treatment required for mental retardation. Dr. Chang did not explain how he arrived at his conclusion regarding these fifth category criteria.

27. On June 26 and 27, 2006, Robert Marselle, Psy.D., R.N., conducted a psychological assessment. Claimant was 14 years and 11 months old.

28. Dr. Marselle administered the WISC-III. Claimant achieved a verbal score of 54 and a performance score of 55, which produced a full scale IQ of 53. Dr. Marselle diagnosed mild mental retardation.

29. Dr. Marselle wrote that claimant, at age 14, would not have the means to provide food, shelter, or clothing for herself if she were left alone. Dr. Marselle recommended psychotherapy to treat cognitive disorders,² consultation with a psychiatrist for evaluation for psychopharmacological intervention, abstinence from drugs and alcohol, and an annual evaluation to determine the best ways to meet claimant's needs.

30. As noted above, Judge Brozio heard claimant's appeal from the regional center's decision that she was not eligible for services. Judge Brozio rendered a decision dated July 12, 2007. He found that the evidence before him was insufficient to support a finding that claimant was mentally retarded. He also found that the evidence did not establish that claimant had a condition that required treatment similar to that required for individuals with mental retardation. Judge Brozio, however, upheld claimant's appeal based in a finding that claimant had a condition that was closely related to mental retardation.

31. As noted above, the regional center reassessed claimant in 2010 and, again, a regional center interdisciplinary diagnostic team concluded that claimant was not eligible for regional center services. That reassessment was based on a psychological assessment by Sandra Brooks, Ph.D., a regional center staff psychologist, and on records she documented in her report.

32. Dr. Brooks evaluated claimant on February 24, 2010, and March 9 and 18, 2010. Claimant was 18 years and 5 months old.

33. Dr. Brooks administered a number of tests, including the Wechsler Adult Intelligence Scale – Fourth Edition (WISC-IV). On that test, claimant achieved a verbal comprehension index composite score of 66, a perceptual reasoning index

² A clear implication from the reports and testimony of other experts was that psychotherapy is not a treatment for cognitive disorders.

composite score of 51, and a working memory composite score of 53. These scores produced a full scale IQ of 50. Dr. Brooks was unable to calculate a processing speed index because claimant did not complete the subtests that are necessary to calculate that index. Dr. Brooks observed that claimant did not appear to put forth her best effort during most testing activities. Dr. Brooks concluded that it was likely that the test scores underestimated claimant's intellectual abilities.

34. Because Dr. Brooks suspected that claimant was not putting forth her best effort, Dr. Brooks administered two objective validity tests. One was the Test of Memory Malingering (TOMM). The other was The b Test. Dr. Brooks reported, "The results on *both* validity tests are consistent with 'suspect effort' according to their . . . administration manuals. ["Suspect effort"] suggests that the examinee is likely to have fabricated or exaggerated their cognitive impairment." (*Italics added.*) Dr. Brooks's report concerning the TOMM test is not correct. There is one range of scores that does *not* suggest that a person is malingering, and claimant scored on the low side of that range. On The b Test, however, claimant's score suggested a very, very low effort. Dr. Brooks testified that the scores on the WISC-IV should be considered invalid.

35. As noted above, claimant suffers from seizures, and Dr. Brooks acknowledged that complex partial seizures could affect test scores.

36. On Axis I, Dr. Brooks diagnosed Malingering; Learning Disorder, Not Otherwise Specified; and Dysthymic Disorder. She recommended further consideration of a possible Attention Deficit Hyperactivity Disorder, Not Otherwise Specified. "Malingering" is not an illness, and a diagnosis of malingering is not a clinical diagnosis. Malingering is diagnosed when an evaluator concludes that test results are invalid because a subject was motivated by some incentive to perform poorly. The essential feature of malingering is the intentional production of false or exaggerated responses motivated by external incentives such as avoiding military service, avoiding work, or obtaining financial compensation.

37. On Axis II, which is where a mental retardation diagnosis would be found, Dr. Brooks made no diagnosis.

38. Dr. Brooks recommended individual psychotherapy to address psychological issues.

39. Dr. Brooks concluded that claimant did not present as an individual with mental retardation and that it was not in her best interest to be treated as an individual with mental retardation. "Treatment for Crisheona should focus on academic remediation, teaching life skills, and addressing her emotional needs in a supportive environment to help her reach her full potential." In Dr. Brooks's report, she did not specifically address the other fifth category ground for eligibility. That is, she did not say that claimant does not have a condition that is closely related to

mental retardation. She did conclude that claimant is not eligible for regional center services, and in her testimony, she said claimant is not eligible under the fifth category.

40. On March 13, 2011, Roger Tilton, Ph.D., conducted a psychological assessment. Dr. Tilton administered a number of tests, including the WISC-III. On that test, claimant achieved a verbal abilities score of 54, a performance abilities score of 54, which produced a full scale IQ of 50. In a written report, Dr. Tilton said. "Overall, her intellectual functioning falls in the lower end of the mildly mentally retarded range."

41. Dr. Tilton administered the TOMM and concluded that claimant's pattern of scores could represent the performance of an individual who may have been intentionally trying to miss items. Nevertheless, Dr. Tilton diagnosed mild mental retardation.

42. On Axis I, Dr. Tilton made no diagnosis.

43. On Axis II, Dr. Tilton diagnosed mild mental retardation.

44. On Axis III, Dr. Tilton diagnosed complex partial seizures.

45. On Axis IV, Dr. Tilton diagnosed difficulty dealing with basic tasks of life.

46. Dr. Tilton said claimant's level of functioning appeared to be markedly limited, and he said she did not appear capable of functioning in a work setting. He said she was not competent to manage funds.

47. Elaine Lois, M.D., testified concerning her review of claimant's records. Dr. Lois is Chief of Medical Services for Inland Regional Center. She had not met or evaluated claimant. Dr. Lois noted that claimant's IQ scores were not valid.

48. Dr. Lois testified that there are achievement scores that show that claimant is able to perform intellectually at a level that is higher than a person with mental retardation could perform. Dr. Lois did not say what achievement scores show that, and she did not say what the scores were. The evidence in support of her conclusion is not convincing. *The only evidence presented as to what a mentally retarded person is capable of achieving was from the DSM-IV. According to the DSM IV, by their late teens, people with mild mental retardation can acquire academic skills up to approximately the sixth-grade level.* The only evidence that claimant has acquired academic knowledge beyond the fourth grade level comes from Dr. Chang's summary of two administrations of the Woodcock-Johnson – III Test of Achievement. As noted above, Dr. Chang did not administer any tests; he only

summarized claimant's records. He reported that, when claimant should have been in the seventh and eighth grades, her academic skills were within the average range for children her age. Dr. Chang, however, did not report claimant's scores or the grade equivalent for her scores. And as noted above, Dr. Pflaumer, who tested claimant when she should have been in the ninth grade, also referred to her academic achievement as being in the average to low average range. His report of average to low average achievement, however, was based on claimant's having tested at a fourth grade level in reading and spelling and at a third grade level in arithmetic *at a time when she should have been in the ninth grade*. Comparing Dr. Chang's report with Dr. Pflaumer's results, one must conclude either that the scores that underlay Dr. Chang's report showed claimant achieving at the third and fourth grade levels or that, in the one year between the tests Dr. Chang reported on and Dr. Pflaumer's testing, claimant fell from an eighth grade level to a third and fourth grade level. And as will be related below, claimant's teacher for the past four years testified that claimant struggles to read at a beginning fourth grade level. The evidence that claimant has achieved beyond what the DSM-IV says a mildly mentally retarded person can achieve is not convincing. Dr. Lois's testimony that there are achievement scores that show that claimant is able to perform intellectually at a level that is higher than a person with mental retardation could perform is not convincing.

49. Dr. Brooks wrote that, according to claimant's mother and teachers, claimant could read at grade level. Dr. Brooks, however, could not recall why she wrote that. Both claimant's mother and Jerry Scott, who has been claimant's teacher for four years, testified that they had not said that. Mr. Scott testified that claimant struggles to read at a beginning fourth grade level and sometimes reverts to a third grade level.

50. Dr. Lois said claimant does not fit the definition of fifth category. Dr. Lois, however, did not adequately explain how she came to that conclusion. She said claimant needs mental health assistance, behavior training, and help with depression.

51. Dr. Lois testified that she does not know whether claimant has a substantially disabling condition. The implication of this testimony was that Dr. Lois is confident that claimant does not have a condition that is similar to mental retardation and, therefore, whether she has some substantially disabling condition is not relevant to this inquiry.

52. Robert Suiter holds a master's degree in nursing and a doctor's degree in clinical psychology. He has been a licensed psychologist for more than 25 years. Dr. Suiter has not evaluated claimant. He has reviewed certain records. He testified concerning malingering and concerning the remarkable consistency of claimant's scores on intelligence tests.

53. Dr. Suiter said the reports of claimant's various test results suggest that her performance did not reflect her maximum ability. He said that he, however, did

not find grounds for concluding that claimant was intentionally malingering. One reason to doubt that claimant was malingering is the fact that it is difficult to imagine what benefit she would see herself getting from not doing as well as she could on the tests.

54. Dr. Sutter testified that the evidence that suggested that claimant could do better than she has done on cognitive tests may make a diagnosis of mental retardation impossible, but claimant's very consistent scores suggest that they have some reliability. The implication of his testimony was that, while the scores may not support a diagnosis of mental retardation, they do show cognitive impairment.

55. Dr. Brooks, with regard to her malingering diagnosis, acknowledged that "it is not entirely clear what Crisheona's motivation for doing poorly might be . . ." Dr. Brooks noted that claimant has indicated her desire to stay with her mother "forever." Dr. Brooks suggested that it may be that claimant believes that by exaggerating her cognitive impairments she will increase the likelihood of being able to stay with her mother. Dr. Brooks did not explain the logic of her suggestion, and it is not apparent. Moreover, in 2004, which was before claimant went to live with Valerie R., Dr. Kendall's administration of the WISC-III produced a full scale IQ of 59. Regarding that administration of the WISC, Dr. Brooks's suggested motivation cannot possibly have accounted for claimant's poor performance.

56. Dr. Suiter, by explaining how test scores are scaled, cast further doubt on the idea that claimant has been malingering. Over the course of six years, in four administrations of the Wechsler Adult Intelligence Scale, claimant achieved full scale IQs of 49, 53, 50, and 50. Dr. Suiter explained that scores are scaled according to the subject's age. Thus, a person who repeats the test must do better in subsequent tests in order to get the same score. Dr. Suiter testified that, claimant's achieving essentially the same score in four administrations over six years would have required her to improve her performance just enough each time to cause the scaling to produce approximately the same IQ. Dr. Suiter said it would be quite a trick to malingering just enough "to pull that off."

57. Dr. Suiter said claimant may consistently have lacked motivation to score well, but that does not mean she is malingering. A number of factors may contribute to a lack of motivation – factors such as low self esteem.

Claimant's Performance at School

58. Claimant's school district provides her with special education services based on an assessment of "intellectual disability," which is the term the school district uses in place of "mental retardation."

59. Claimant has a one-on-one aid at school and door-to-door transportation because of her propensity to wander off and because of her poor

judgment concerning matters having to do with safety. The one-on-one aid is a female because claimant needs assistance with feminine hygiene. If claimant were on the street alone, she would be at risk of being manipulated and taken advantage of. She has been taken advantage of in the past. She has been raped, and she has been prostituted.

60. In September of 2009, claimant was 18 years old and should have completed high school. In the individual education plan (IEP) developed for her at that time, it was reported that she could write a simple, four to five sentence paragraph; multiply and divide two digit numbers with help; read at a third grade level; and make change up to \$5.00 with some help.

61. In the individual education plan (IEP) developed for claimant for January of 2011, one goal was for her to learn to read at a fourth grade level.

62. Jerry Scott has been claimant's teacher for four years. Mr. Scott has taught for 34 years and is an educational specialist for claimant's school district. Mr. Scott testified that claimant functions as a child of 10 to 12 years old would function. Mr. Scott said he has never concluded that claimant was malingering in his class. He said that, before testing claimant, one must prepare her to take a test. One must familiarize her with the test ahead of time. If one does not do that, claimant becomes confused and her confusion leads to combativeness and avoidance. Mr. Scott testified that in the testing he has done, claimant has performed consistently. Her test results do not vary to any great extent. He said malingering requires a level of sophistication and an ability to plan that he has not observed in claimant.

63. Mr. Scott said claimant reads at a beginning fourth grade level, but she struggles to do that. Also, she tends to regress to a third grade level, and Mr. Scott then must deal with her sequencing and comprehension problems. Mr. Scott said it is possible that, with great effort, claimant could learn to read at a fifth grade level. She will not be able to learn to read a newspaper and understand it.

64. Mr. Scott said students in the third grade learn to read decimal numbers in a linear presentation and line them up in a vertical presentation. He said claimant, on some days, can do that with the assistance of an aid but on other days cannot do it even with assistance. Mr. Scott said claimant becomes unable to repeat a task because she "shuts down." Claimant lacks expansion skills. For example, when confronted with the task of multiplying decimal numbers, she cannot apply what she knows about adding decimal numbers." Also, claimant's level of motivation is very low.

65. Mr. Scott teaches money math three days a week. For four years, he has tried to teach claimant how to put coins together to reach a given total, but it still is very difficult for her to do that.

66. In the IEP developed for claimant in May of 2011, one goal was for claimant to learn to divide multi-digit numbers without prompting from the teacher. Mr. Scott said children in the third grade learn to do that with a single digit divisor, but he had to give up on this goal for claimant. He said he also had to give up on teaching claimant to use fractions. He said he concentrates on trying to help claimant learn to add and subtract decimal numbers.

67. Mr. Scott testified that claimant is 20 years old but has a difficult time coping with her peers because people do not understand that she must be treated as though she were 12 years old. She does not process information appropriately. She does not think about how she should respond to people. Mr. Scott said claimant talks to him about menstruation and seems to have no sense that that might be inappropriate.

68. When Mr. Scott takes students out into the community, claimant does not keep herself clean and pays no attention to traffic signals.

69. Claimant currently is in a functional skills curriculum, and the focus is on teaching life skills. The aim is to make claimant as functional as possible and to help her learn to live as independently as possible. Claimant's individualized transition plan does not suggest she will be able to hold a job or function independently. She has made very slow progress academically.

Claimant's Mother's Testimony

70. The following is a paraphrased summary of part of Valerie R's testimony: Claimant does not understand how to avoid being exploited. During the time claimant was taken away from me and placed in group homes, she was raped. Also, a school bus driver sexually molested her on a few occasions. On an occasion when claimant ran away from home, she was prostituted. At 20 years old, she still cannot bathe herself properly or groom her hair. At family gatherings, claimant fits in with 12-year-old girls and cannot fit in with girls her age. Claimant becomes oppositional when pressured to do things she cannot do. She does not change her pad when she is menstruating. She has no sense of stranger danger. She trusts everyone and would go off with anyone who asked her. She is child-like.

Does Claimant have a Disability?

71. Claimant has serious mental health problems.

72. Claimant has seizures. Valerie R's testimony concerning claimant's seizures was uncontroverted. Valerie R testified that Crisheona experiences complex partial seizures. She can have up to 50 seizures a day. And it causes her not to understand what is going on.

73. Claimant lacks motivation.

74. Claimant has profoundly limited coping skills.

75. Claimant's academic achievement has been very low. When she should have been in the ninth grade, she tested at a fourth grade level in reading and spelling and at a third grade level in arithmetic. When claimant was 18 years old, school records show that she was reading at a third grade level. Mr. Scott, who has been claimant's teacher for four years, testified that claimant struggles to read at a fourth grade level and sometimes regresses to a third grade level. Claimant is poorly motivated, but Mr. Scott has never concluded that she intentionally performs poorly. He said she becomes confused and combative. Mr. Scott, who appeared to be a patient and dedicated person, said he was unable to teach claimant to divide multi digit numbers with a single digit divisor. Mr. Scott appeared to be thoughtful and careful. His testimony was very credible.

76. Claimant's scores on intelligence tests may not support a diagnosis of mental retardation. However, the remarkable consistency of her scores over a number of years and on tests administered by numerous professionals is evidence of cognitive impairment.

77. Claimant has no sense of stranger danger. She trusts everyone and would go off with anyone who asked her. She is child-like.

78. Claimant's school district provides special education services to her based on a determination that she has an intellectual disability.

79. This combination of assessments and failures supports a finding that claimant has a disability.

The Limitation Regarding Reassessment of Substantial Disability Does Not Apply in this Case

80. Welfare and Institutions Code section 4512, subdivision (l), limits the criteria to be used in reassessment.

81. That subdivision lists "seven *areas of major life activity*" and defines "substantial disability" as the existence of significant functional limitations in three or more of those areas. (*Italics added.*)

82. Subdivision (l) further provides: "Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same *criteria* under which the individual was originally made eligible." (*Italics added.*)

83. The word "criteria" is not found in the balance of section 4512 and

appears to refer back to “areas of . . . activity.” That is, the limitation appears to mean that, in a reassessment, the same “three or more areas of activity” that were used in the former determination of eligibility must be used in the reassessment.

84. Assuming that is the meaning of the limitation, it can not apply in this case because claimant was originally made eligible as a result of Judge Brozio’s decision, and he did not arrive at a finding of substantial disability by addressing areas of life activity from the subdivision (1) list. He disposed of that issue by finding that the parties had no disagreement that claimant “met the criteria establishing a substantial handicap.”

Does Claimant’s Disability Constitute a Substantial Disability for Her?

85. California Code of Regulations, title 17, section 54001, subdivision (a)(1), defines substantial disability, in part, as “a condition which results in major impairment of . . . social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential”

86. In social situations, claimant has not protected herself from being victimized. She has been raped and prostituted. In social situations, she seeks out girls who are 12 and 13 years old and cannot effectively interact with girls of her own age. She does not change her pad when she is menstruating. She has no sense of stranger danger. She trusts everyone and would go off with anyone who asked her. She is child-like.

87. Mr. Scott testified that claimant is 20 years old but has a difficult time coping with her peers because people do not understand that she must be treated as though she were 12 years old. She does not process information appropriately. She does not think about how she should respond to people. Claimant talks to Mr. Scott about menstruation and seems to have no sense that that might be inappropriate. When Mr. Scott takes students out into the community, claimant does not keep herself clean.

88. Claimant’s condition results in a major impairment of social functioning. Claimant needs services to help her learn to achieve her maximum potential in social functioning.

89. California Code of Regulations, title 17, section 54001, subdivision (a)(2), defines substantial disability, in part, as the existence of significant functional limitations in three or more specified areas of major life activity, as appropriate to the person’s age.

90. One specified area of major life activity is learning. Claimant has significant functional limitations in learning. When she should have been in the ninth

grade, she tested at a fourth grade level in reading and spelling and at a third grade level in arithmetic. When claimant was 18 years old, school records show that she was reading at a third grade level. Mr. Scott, who has been claimant's teacher for four years, testified that claimant struggles to read at a fourth grade level and sometimes regresses to a third grade level. Mr. Scott, who appeared to be a patient and dedicated person, said he was unable to teach claimant to divide multi digit numbers with a single digit divisor. The remarkable consistency of claimant's scores over a number of years on intelligence tests is evidence of cognitive impairment. Claimant experiences complex partial seizures. She can have up to 50 seizures a day. And it causes her not to understand what is going on. Claimant's school district provides special education services to her based on a determination that she has an intellectual disability.

91. One specified area of major life activity is self-care. Claimant has significant functional limitations in self-care. At 20 years old, she still cannot bathe herself properly or groom her hair. She does not change her pad when she is menstruating. Her one-on-one aid at school is a female because claimant requires assistance with feminine hygiene. When Mr. Scott takes students out into the community, claimant does not keep herself clean.

92. One specified area of major life activity is independent living. Claimant has significant functional limitations in her capacity for independent living. Claimant does not understand how to avoid being exploited. During the time claimant was taken away from her mother and placed in group homes, she was raped. Also, a school bus driver sexually molested her on a few occasions. On an occasion when claimant ran away from home, she was prostituted. Dr. Tilton concluded that claimant is not competent to manage funds. Claimant has a one-on-one aid at school and door-to-door transportation because of her propensity to wander off and because of her poor judgment concerning matters having to do with safety.

93. One specified area of major life activity is economic self sufficiency. Claimant has significant functional limitations in economic self sufficiency. There was no evidence that claimant could maintain employment. And the conditions described above are inconsistent with maintaining employment. Dr. Tilton concluded that claimant's level of functioning appeared to be markedly limited, and she did not appear capable of functioning in a work setting. He said she was not competent to manage funds.

94. Claimant's disability constitutes a substantial disability for her.

Dr. Brooks's Assessment of Claimant's Adaptive Functioning

95. Dr. Brooks had claimant complete three subtests of the Street Survival Skills Questionnaire. Dr. Brooks concluded that claimant's responses indicated

inconsistent skills, which typically is associated with malingering or random selection.

96. Dr. Brooks reported: Valerie R. and Mr. Scott both completed the Vineland Adaptive Behavior Scales – II. Valerie R., Mr. Scott, and claimant’s one-on-one aid completed the Social Skills Questionnaire. Also, Valerie R. completed the Scales of Independent Behavior – Revised.

97. From Dr. Brooks’s report, one cannot determine when Valerie R. and Mr. Scott completed the Vineland or for whom they completed it. It appears that they did not complete the Vineland for Dr. Brooks because she said that certain “scores were not provided.” From Mr. Scott’s responses a composite score of 71 was calculated. Dr. Brooks did not say what the significance of a 71 is. From Mr. Scott’s responses, a communication score of 69 was calculated. From Valerie R’s responses, the same communication score was calculated. Someone reported that, regarding daily living skills and socialization, the scores calculated from Valerie R’s responses were much lower than the scores calculated from Mr. Scott’s responses.

98. Concerning the Social Skills Questionnaire, Dr. Brooks said large differences existed between the ratings calculated from Valerie R’s responses and the ratings calculated from Mr. Scott’s responses and the responses of claimant’s one-on-one aid. Dr. Brooks reported that the ratings calculated from Mr. Scott’s responses and claimant’s one-on-one aid’s responses indicated that claimant has age-appropriate social skills and age-appropriate academic competence.

99. Other evidence concerning claimant’s social skills and academic competence would suggest that these results are not reliable. There is substantial evidence that claimant, at 20 years old, functions socially at a 12 to 13-year-old level. Also, there is substantial evidence that claimant, at 20 years old, is very far from having age-appropriate academic competence. School records for a time when claimant was 18 years old show that she was reading at a third grade level. Mr. Scott, who has been claimant’s teacher for four years, testified that currently claimant struggles to read at a fourth grade level and sometimes regresses to a third grade level. Mr. Scott said he was unable to teach claimant to divide multi digit numbers with a single digit divisor.

100. Concerning the Scales of Independent Behavior – Revised, Dr. Brooks said the ratings calculated from Valerie R’s responses indicated that claimant demonstrates deficits in all domains of adaptive functioning. Dr. Brooks observed that Valerie R’s responses did not seem to be consistent with claimant’s presentation or her scores on tests of intellectual functioning. Dr. Brooks said, also, that Valerie R’s responses resulted in a significantly lower rating than the rating obtained previously by Mr. Scott’s responses. Dr. Brooks concluded that the adaptive skills rating obtained from Valerie R’s responses appear to underestimate claimant’s true ability.

Other Evidence Regarding Claimant's Adaptive Functioning

101. Claimant is 20 years old. Compared with other 20-year-old women from her sociocultural background who were reared in urban settings in California, claimant has serious impairments in adaptive functioning. She does not effectively cope with common life demands. She does not come close to – let alone meet – the standards of independence expected of a 20-year-old woman.

102. Claimant lacks motivation. She has profoundly limited coping skills.

103. Claimant's academic achievement has been very low. When she should have been in the ninth grade, she tested at a fourth grade level in reading and spelling and at a third grade level in arithmetic. When claimant was 18 years old, school records show that she was reading at a third grade level. Mr. Scott, who has been claimant's teacher for four years, testified that claimant struggles to read at a fourth grade level and sometimes regresses to a third grade level. Claimant is poorly motivated, but Mr. Scott has never concluded that she intentionally performs poorly. He said she becomes confused and combative. Mr. Scott, who appeared to be a patient and dedicated person, said he was unable to teach claimant to divide multi digit numbers with a single digit divisor.

104. Claimant has no sense of stranger danger. She trusts everyone and would go off with anyone who asked her. She is child-like.

105. Claimant's school district provides special education services to her based on a determination that she has an intellectual disability. Her school district also provides door-to-door transportation because claimant has a tendency to run away. At pedestrian crossings, claimant tends not to pay attention to crossing signals.

106. Claimant has not protected herself from being victimized. Claimant does not understand how to avoid being exploited. During the time claimant was taken away from her mother and placed in group homes, she was raped. Also, a school bus driver sexually molested her on a few occasions. On an occasion when claimant ran away from home, she was prostituted.

107. Claimant seeks out girls who are 12 and 13 years old and cannot effectively interact with girls her own age. She does not change her pad when she is menstruating. Her one-on-one aid at school is a female because claimant requires assistance with feminine hygiene.

108. Claimant is 20 years old but has a difficult time coping with her peers because people do not understand that she must be treated as though she were 12 years old. She does not process information appropriately. She does not think about how she should respond to people. Claimant talks to her male teacher about

menstruation and seems to have no sense that that might be inappropriate. When claimant goes out into the community on school trips, she does not keep herself clean.

109. Claimant has significant functional limitations in self-care. At 20 years old, she still cannot bathe herself properly or groom her hair.

110. Dr. Tilton concluded that claimant was not competent to manage funds.

111. There was no evidence that claimant could maintain employment. And the conditions described above are inconsistent with maintaining employment. Dr. Tilton concluded that claimant's level of functioning appeared to be markedly limited, and she did not appear capable of functioning in a work setting.

112. Claimant has significant limitations in adaptive functioning in self-care, social/interpersonal skills, functional academic skills, work, and safety. Because of this combination of limitations, it is likely that she also has significant limitations in adaptive functioning in the use of community resources; however, there was little direct evidence on that point.

Interdisciplinary Team Used Incorrect Definition of "Substantial Disability"

113. Before August 11, 2003, Welfare and Institutions Code section 4512 provided that, in determining whether a disability constituted a *substantial* disability, one part of the analysis was to address aspects of functioning, including communication skills, learning, self-care, mobility, self-direction, capacity for independent living, and economic self-sufficiency – all as appropriate to the age of the consumer. That version of the definition was also found in California Code of Regulations, title 17, section 54001.

114. On August 11, 2003, the current version of the definition became law. The changes were significant. "Communication skills" was eliminated from the list of life activities. The more significant change, however, was that so long as a regional center found the existence of significant functional limitations in at least three of the specified life activities, the "substantial disability" requirement was satisfied. Under the former definition a regional center might have found that a person's disability was not a substantial disability in spite of the existence of significant functional limitations in three of the specified life activities. As of August 11, 2003, that was not permitted.

115. Claimant applied for regional center services in 2005, many months after the new definition became law. Nevertheless, in the regional center's recent reevaluation, the interdisciplinary team used the definition that had been repealed. In the regional center's notice of proposed action, a letter of October 26, 2010, to claimant and her mother, the regional center advised that the disciplinary team used the former version of the definition.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Judge Brozio determined that claimant has a substantially disabling condition closely related to mental retardation. The regional center is seeking to reverse that determination, i.e., the regional center is seeking a determination that claimant does not have a substantially disabling condition closely related to mental retardation. Thus, the regional center has the burden of proof.

2. As noted in footnote number one, Welfare and Institutions Code, section 4643.5, subdivision (b), provides that an individual who is determined *by a regional center* to have a developmental disability shall remain eligible unless a regional center concludes that the original determination was “clearly erroneous.” (Italics added.) No regional center has ever determined that claimant has a developmental disability. It was Judge Brozio who determined that. Therefore, this special standard of proof does not apply. Evidence Code section 115 provides, in part, “Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.” Thus, the standard of proof in this case is a preponderance of the evidence.

An Overview of the Law

3. Under the Lanterman Developmental Disabilities Services Act, the State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. (Welf. & Inst. Code, § 4501.)

4. Welfare and Institutions Code section 4512, subdivision (a), defines developmental disability:

“Developmental disability” means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation *or* to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature. (Italics added.)

5. Given the disjunctive, the fifth category encompasses two grounds for eligibility.

6. California Code of Regulations, title 17, section 54000, subdivision (c) specifies certain conditions that do not constitute developmental disabilities as that term is used in the Lanterman Act.

Developmental Disability shall not include handicapping conditions that are: (1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder. (2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss. (3) Solely physical in nature.

7. Welfare and Institutions Code section 4512, subdivision (l), defines substantial disability and limits the criteria to be used in reassessment:

“Substantial disability” means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

- (1) Self-care.
- (2) Receptive and expressive language.
- (3) Learning.
- (4) Mobility.
- (5) Self-direction.
- (6) Capacity for independent living.

(7) Economic self-sufficiency.

Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.

8. California Code of Regulations, title 17, section 54001, subdivision (a), further defines substantial disability:

“Substantial disability” means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person’s age:

(A) Receptive and expressive language;

(B) Learning;

(C) Self-care;

(D) Mobility;

(E) Self-direction;

(F) Capacity for independent living;

(G) Economic self-sufficiency.

A Condition Cannot Qualify Under the Fifth Category Unless it is Very Similar to Mental Retardation

9. In *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, the court held that “the fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded. Furthermore, the various additional factors

required in designating an individual developmentally disabled and substantially handicapped must apply as well.” (*Id.* at p. 1129.)

In Determining Who Qualifies as Developmentally Disabled, Deference Should be Given to Regional Center Professionals

10. Deference should be given to the decisions of regional center professionals, *particularly when they have concluded that an individual with an unanticipated condition is eligible for regional center services.*

11. The *Mason* court said, “[I]t appears that it was the intent of those enacting the Lanterman Act and its implementing regulations not to provide a detailed definition of ‘developmental disability’ so as to allow greater deference to the [regional center] professionals in determining who should qualify as developmentally disabled and allow some flexibility in determining eligibility so as not to rule out eligibility of individuals with unanticipated conditions, who might need services.” (*Id.* at p. 1129.)

Criteria for Diagnosing Mental Retardation

12. In determining whether a person has a disabling condition that is closely related to mental retardation, it is necessary to address the matter of what constitutes mental retardation.

13. The American Psychiatric Association Diagnostic and Statistical Manual, fourth edition, Text Revision (DSM IV TR), identifies three criteria – one “essential” criterion and two other criteria – used in diagnosing mental retardation. The “essential” criterion is “significantly subaverage general intellectual functioning.” A second criterion is that the subaverage general intellectual functioning must be “accompanied by significant limitations in adaptive functioning in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.” And the third and final criterion is that “the onset must occur before the age 18 years.”³

14. The DSM IV TR provides:

General intellectual functioning is defined by the intelligence quotient (IQ or IQ-equivalent) obtained by assessment with one or more of the standardized, individually administered intelligence tests (e.g., Wechsler Intelligence Scales for Children-Revised, Stanford-Binet, Kaufmann Assessment

³ DSM IV TR p. 41.

Battery for Children). Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus it is possible to diagnose mental retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior. Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning. . . . When there is significant scatter in the subtest scores, the profile of strengths and weaknesses, rather than the mathematically derived full scale IQ, will more accurately reflect the person's learning abilities. When there is a marked discrepancy across verbal and performance scores, averaging to obtain a full-scale IQ score can be misleading.⁴

[¶] . . . [¶]

Adaptive functioning refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting. Adaptive functioning may be influenced by various factors, including education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with Mental Retardation.

[¶] . . . [¶]

It is useful to gather evidence for deficits in adaptive functioning from one or more reliable, independent sources (e.g., teacher evaluation and educational, developmental, and medical history). Several scales have also been designed to measure adaptive functioning or behavior (e.g., the Vineland Adaptive Behavior Scales and the American Association on Mental Retardation Adaptive Behavior Scale.) These scales generally

⁴ *Id.* at p. 42.

provide a clinical cutoff score that is a composite of performance in a number of adaptive skill domains.

[¶] . . . [¶]

By their late teens, [people with mild mental retardation] can acquire academic skills up to approximately the sixth-grade level.

[¶] . . . [¶]

Lack of communication skills may predispose to disruptive and aggressive behaviors that substitute for communicative language. Some general medical conditions associated with Mental Retardation are characterized by certain behavioral symptoms (e.g., the intractable self-injurious behavior associated with Lesch-Nyhan syndrome). Individuals with Mental Retardation may be vulnerable to exploitation by others (e.g., being physically and sexually abused) or being denied rights and opportunities.

Individuals with Mental Retardation have a prevalence of comorbid mental disorders that is estimated to be three to four times greater than in the general population.

Claimant's Condition is Very Similar to Mental Retardation

15. The remarkable consistency of claimant's scores on intelligence tests suggests that they have some reliability. While the scores may not support a diagnosis of mental retardation, they do show cognitive impairment. Claimant experiences complex partial seizures. She can have up to 50 seizures a day. And it causes her not to understand what is going on. Claimant's school district provides her with special education services based on an assessment of "intellectual disability."

16. By reason of the matters set forth in Findings 95 through 112, it is determined that claimant has significant limitations in adaptive functioning in at least two of the areas specified in the DSM IV TR. Claimant has significant limitations in adaptive functioning in self-care, social/interpersonal skills, functional academic skills, work, and safety – which are areas of life activity specified in Welfare and Institutions Code section 4512, subdivision (1).

17. By their late teens, people with mild mental retardation can acquire academic skills up to approximately the sixth-grade level. Claimant has not acquired

academic skills beyond the sixth grade. Indeed, her academic achievement is at a fourth grade level.

18. Lack of communication skills may predispose people with mental retardation to disruptive and aggressive behaviors that substitute for communicative language. Regarding a related context, Mr. Scott testified to the importance of making claimant familiar with a test before administering it to her. He said that, before testing claimant, one must prepare her to take a test. One must familiarize her with the test ahead of time. If one does not do that, claimant becomes confused and her confusion leads to combativeness and avoidance.

19. Individuals with Mental Retardation may be vulnerable to exploitation by others (e.g., being physically and sexually abused) or being denied rights and opportunities. Respondent has been sexually abused.

20. Individuals with Mental Retardation have a prevalence of comorbid mental disorders that is estimated to be three to four times greater than in the general population. Claimant has serious mental health problems. Behavioral problems include resistance, defiance, anger, and aggression. She engages in maladaptive behaviors. She engages in self-abusive behaviors.

The Regional Center Failed to Prove that Claimant Does Not Have a Substantially Disabling Condition that is Closely Related to Mental Retardation

21. Claimant's disability originated before she attained age 18 years.

22. Her disability continues or can be expected to continue indefinitely.

23. By reason of the matters set forth in Findings 71 through 94, it is determined that claimant's disability constitutes a substantial disability for her.

24. The regional center failed to prove that claimant's condition is solely physical in nature.

25. The regional center failed to prove that claimant's condition is solely a psychiatric disorder.

26. The regional center failed to prove that claimant's impaired intellectual or social functioning originated as a result of her psychiatric disorder.

27. The regional center failed to prove that claimant does not have a substantially disabling condition that is closely related to mental retardation.

The Regional Center's Primary Contention is Not Well Founded

28. The regional center contends as follows: If claimant has a substantial disability, it is not closely related to mental retardation because the existence of functional limitations in areas of major life activity does not indicate a substantial disability within the terms of Welfare and Institutions Code section 4512 unless the limitations are related to cognitive limitations.

29. This is the position taken by the Association of Regional Center Agencies (ARCA) in guidelines – or proposed guidelines – for determining fifth category eligibility. (The title of the document is “Guidelines” The headings on the pages, however, are “Proposed Guidelines” In any event, the guidelines have not been adopted as regulations and have no legal effect.

30. The regional center’s position is not supported by Welfare and Institutions Code section 4512, subdivisions (a) and (l); California Code of Regulations, title 17, section 54000, subdivision (c); or California Code of Regulations, title 17, section 54001, subdivision (a).

31. Welfare and Institutions Code section 4512, subdivision (a), provides, in part:

“Developmental disability” means a disability that . . . constitutes a substantial disability for [an] individual. [¶]
. . . [¶] This term shall . . . include disabling conditions found to be closely related to mental retardation

32. Nothing about this language suggests that, in determining whether a person has a substantial disability, one is to consider limitations only if they are related to cognitive limitations.

33. California Code of Regulations, title 17, section 54000, subdivision (c), specifies certain conditions that do not constitute developmental disabilities as that term is used in the Lanterman Act. It provides, in part:

Developmental Disability shall not include handicapping conditions that are: (1) Solely psychiatric disorders

34. Nothing about this language suggests that, in determining whether a person has a substantial disability, one is to consider limitations only if they are related to cognitive limitations. If limitations are solely psychiatric, they cannot support a finding of developmental disability, but psychiatric disorders and mental retardation often are comorbid conditions. If someone has both a psychiatric disorder and cognitive limitations, it may well be that functional limitations in areas of major life activity may not be solely psychiatric.

35. Welfare and Institutions Code section 4512, subdivision (l), provides, in part:

“Substantial disability” means the existence of significant functional limitations in three or more of the following areas of major life activity . . . as appropriate to the age of the person [A list of seven areas of life activity follows.]

36. Nothing about this language suggests that, in determining whether a person has a substantial disability, one is to consider limitations only if they are related to cognitive limitations.

37. California Code of Regulations, title 17, section 54001, subdivision (a)(1) provides, in part:

“Substantial disability” means:

(1) A condition which results in major impairment of cognitive and/or *social* functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential . . . (Italics added.)

38. Nothing about this language suggests that, in determining whether a person has a substantial disability, one is to consider limitations only if they are related to cognitive limitations. Indeed, the disjunctive suggests that the impairment does not need to have anything to do with cognitive functioning. “ ‘Substantial disability’ means . . . [a] condition which results in major impairment of . . . social functioning”

39. California Code of Regulations, title 17, section 54001, subdivision (a)(2), provides, in part:

“Substantial disability” means:

[¶] . . . [¶]

(2) The existence of significant functional limitations . . . in three or more of the following areas of major life activity, as appropriate to the person’s age [A list of seven areas of life activity follows.]

40. Nothing about this language suggests that, in determining whether a person has a substantial disability, one is to consider limitations only if they are related to cognitive limitations.

41. The statutes and regulations provide no support for the regional center's position.

The Regional Center Failed to Prove that Claimant's Limitations are Not Related to Cognitive Limitations

42. Even if the regional center were correct in its contention that one is to consider limitations only if they are related to cognitive limitations, the regional center would not prevail here because it failed to prove that Claimant's limitations are not related to cognitive limitations.

43. Claimant is not seeking a determination that she is eligible for regional center services. That determination has been made. Judge Brozio decided that. Claimant does not have the burden of proof. Even if the regional center were correct in its contention, claimant would not have to prove that her limitations are related to cognitive limitations. In this case, the regional center seeks to take away claimant's eligibility. If the regional center were correct in its contention, it would have to prove that claimant's limitations are *not related to* cognitive limitations.

44. The regional center failed to prove that claimant does not have significant functional limitations in three areas of major life activity with those limitations being related to cognitive limitations.

45. Assume Dr. Brooks is correct regarding claimant's IQ scores being invalid. That does not mean the regional center has proven that claimant is not cognitively impaired. Claimant's failure to put forth her best effort may mean that her IQ is higher than the full scale IQ of 50 that resulted from Dr. Brooks's administration of the WISC. Claimant's failure to put forth her best effort may mean that claimant's IQ is higher than the full scale IQ of 59 that resulted from Dr. Kendall's administration of the WISC. That, however, does not prove that claimant does not have an IQ under 74, which would place her in the low borderline range or below. Thus, the fact that claimant did not put forth her best effort does not prove that she does not have serious cognitive limitations.

46. The regional center contends that there are achievement scores that show that claimant is able to perform intellectually at a level that is higher than a person with *mental retardation* could perform. First, it would not be enough for the regional center to prove that claimant is not *mentally retarded*. Claimant's eligibility for regional center services is not based on her being mentally retarded. It is based on her having a condition closely related to mental retardation. Second, the evidence that claimant can perform intellectually at a level that is higher than a person with

mental retardation could perform is not convincing. According to the DSM IV, by their late teens, people with mild mental retardation can acquire academic skills up to approximately the sixth-grade level. Substantial evidence supports a finding that claimant performs at a fourth grade level and perhaps could be taught to read at a fifth grade level.

47. Even if the regional center were correct in its contention that one is to consider limitations only if they are related to cognitive limitations, the regional center failed to prove that claimant's limitations are not *related to* cognitive limitations.

ORDER

1. The appeal is granted.
2. Claimant continues to be eligible for regional center services.

DATED:

ROBERT WALKER
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. If a party chooses to appeal, an appeal from this decision must be made to a court of competent jurisdiction within 90 days of receipt of this decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)